EFFECTIVE DATE OF 1979 AMENDMENT

Amendment of this rule by abrogation of subd. (f) by order of the United States Supreme Court of Apr. 30, 1979, effective Dec. 1, 1980, see section 1(1) of Pub. L. 96–42, July 31, 1979, 93 Stat. 326, set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APRIL 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

## Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) INITIAL APPEARANCE.

(1) *Person In Custody*. A person held in custody for violating probation or supervised release must be taken without unnecessary delay before a magistrate judge.

(A) If the person is held in custody in the district where an alleged violation occurred, the initial appearance must be in that district.

(B) If the person is held in custody in a district other than where an alleged violation occurred, the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there.

(2) *Upon a Summons*. When a person appears in response to a summons for violating probation or supervised release, a magistrate judge must proceed under this rule.

(3) *Advice*. The judge must inform the person of the following:

(A) the alleged violation of probation or supervised release;

(B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1).

(4) *Appearance in the District With Jurisdiction*. If the person is arrested or appears in the district that has jurisdiction to conduct a revocation hearing—either originally or by transfer of jurisdiction—the court must proceed under Rule 32.1(b)–(e).

(5) *Appearance in a District Lacking Jurisdiction*. If the person is arrested or appears in a district that does not have jurisdiction to conduct a revocation hearing, the magistrate judge must:

(A) if the alleged violation occurred in the district of arrest, conduct a preliminary hearing under Rule 32.1(b) and either:

(i) transfer the person to the district that has jurisdiction, if the judge finds probable cause to believe that a violation occurred; or

(ii) dismiss the proceedings and so notify the court that has jurisdiction, if the judge finds no probable cause to believe that a violation occurred; or

(B) if the alleged violation did not occur in the district of arrest, transfer the person to the district that has jurisdiction if:

(i) the government produces certified copies of the judgment, warrant, and warrant application, or produces copies of those certified documents by reliable electronic means; and

(ii) the judge finds that the person is the same person named in the warrant.

(6) *Release or Detention*. The magistrate judge may release or detain the person under 18 U.S.C. §3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

(b) REVOCATION.

(1) *Preliminary Hearing*.

(A) *In General*. If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

(B) *Requirements*. The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person:

(i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;

(ii) an opportunity to appear at the hearing and present evidence; and

(iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.

(C) *Referral*. If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

(2) *Revocation Hearing*. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(E) an opportunity to make a statement and present any information in mitigation.

(c) MODIFICATION.

(1) *In General*. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.

(2) *Exceptions.* A hearing is not required if:

(A) the person waives the hearing; or

(B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and

(C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.

(d) DISPOSITION OF THE CASE. The court's disposition of the case is governed by 18 U.S.C. §3563 and §3565 (probation) and §3583 (supervised release).

(e) PRODUCING A STATEMENT. Rule 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(Added Apr. 30, 1979, eff. Dec. 1, 1980; amended Pub. L. 99–646, §12(b), Nov. 10, 1986, 100 Stat. 3594; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 28, 2010, eff. Dec. 1, 2010.)

NOTES OF ADVISORY COMMITTEE ON RULES—1979

*Note to Subdivision* (a)(1). Since *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), it is clear that a probationer can no longer be denied due process in reliance on the dictum in *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935), that probation is an ''act of grace.'' See Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv.L.Rev. 1439 (1968); President's Commission on Law Enforcement and Administration of Justice. Task Force Report: Corrections 86 (1967).

Subdivision (a)(1) requires, consistent with the holding in *Scarpelli*, that a prompt preliminary hearing must be held whenever ''a probationer is held in custody on the ground that he has violated a condition of his probation.'' See 18 U.S.C. §3653 regarding arrest of the probationer with or without a warrant. If there is to be a revocation hearing but there has not been a holding in custody for a probation violation, there need not be a preliminary hearing. It was the fact of such a holding in custody ''which prompted the Court to determine that a preliminary as well as a final revocation hearing was required to afford the petitioner due process of law.'' *United States v. Tucker*, 524 F.2d 77 (5th Cir. 1975). Consequently, a preliminary hearing need not be held if the probationer was at large and was not arrested but was allowed to appear voluntarily, *United States v. Strada*, 503 F.2d 1081 (8th Cir. 1974), or in response to a show cause order which ''merely requires his appearance in court,'' *United States v. Langford*, 369 F.Supp. 1107 (N.D.Ill. 1973); if the probationer was in custody pursuant to a new charge, *Thomas v. United States*, 391 F.Supp. 202 (W.D.Pa. 1975), or pursuant to a final conviction of a subsequent offense, *United States v. Tucker*, supra; or if he was arrested but obtained his release.

Subdivision (a)(1)(A), (B) and (C) list the requirements for the preliminary hearing, as developed in *Morrissey* and made applicable to probation revocation cases in *Scarpelli*. Under (A), the probationer is to be given notice of the hearing and its purpose and of the alleged violation of probation. ''Although the allegations in a motion to revoke probation need not be as specific as an indictment, they must be sufficient to apprise the probationer of the conditions of his probation which he is alleged to have violated, as well as the dates and events which support the charge.'' *Kartman v. Parratt*, 397 F.Supp. 531 (D.Nebr. 1975). Under (B), the probationer is permitted to appear and present evidence in his own behalf. And under (C), *upon request* by the probationer, adverse witnesses shall be made available for questioning unless the magistrate determines that the informant would be subjected to risk or harm if his identity were disclosed.

Subdivision (a)(1)(D) provides for notice to the probationer of his right to be represented by counsel at the preliminary hearing. Although *Scarpelli* did not impose as a constitutional requirement a right to counsel in all instances, under 18 U.S.C. §3006A(b) a defendant is entitled to be represented by counsel whenever charged ''with a violation of probation.''

The federal magistrate (see definition in rule 54(c)) is to keep a record of what transpires at the hearing and, if he finds probable cause of a violation, hold the probationer for a revocation hearing. The probationer may be released pursuant to rule 46(c) pending the revocation hearing.

*Note to Subdivision* (a)(2). Subdivision (a)(2) mandates a final revocation hearing within a reasonable time to determine whether the probationer has, in fact, violated the conditions of his probation and whether his probation should be revoked. Ordinarily this time will be measured from the time of the probable cause finding (if a preliminary hearing was held) or of the issuance of an order to show cause. However, what constitutes a reasonable time must be determined on the facts of the particular case, such as whether the probationer is available or could readily be made available. If the probationer has been convicted of and is incarcerated for a new crime, and that conviction is the basis of the pending revocation proceedings, it would be relevant whether the probationer waived appearance at the revocation hearing.

The hearing required by rule 32.1(a)(2) is not a formal trial; the usual rules of evidence need not be applied. See *Morrissey v. Brewer*, supra (''the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial''); Rule 1101(d)(e) of the Federal Rules of Evidence (rules not applicable to proceedings ''granting or revoking probation''). Evidence that would establish guilt beyond a reasonable doubt is not required to support an order revoking probation. *United States v. Francischine*, 512 F.2d 827 (5th Cir. 1975). This hearing may be waived by the probationer.

Subdivisions (a)(2)(A)–(E) list the rights to which a probationer is entitled at the final revocation hearing. The final hearing is less a summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause. Thus, the probationer has certain rights not granted at the preliminary hearing: (i) the notice under (A) must by written; (ii) under (B) disclosure of all the evidence against the probationer is required; and (iii) under (D) the probationer does not have to specifically request the right to confront adverse witnesses, and the court may not limit the opportunity to question the witnesses against him.

Under subdivision (a)(2)(E) the probationer must be given notice of his right to be represented by counsel. Although *Scarpelli* holds that the Constitution does not compel counsel in all probation revocation hearings, under 18 U.S.C. §3006A(b) a defendant is entitled to be represented by counsel whenever charged ''with a violation of probation.''

Revocation of probation is proper if the court finds a violation of the conditions of probation and that such violation warrants revocation. Revocation followed by imprisonment is an appropriate disposition if the court finds on the basis of the original offense and the intervening conduct of the probationer that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; or

(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

(iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

See American Bar Association, Standards Relating to Probation §5.1 (Approved Draft, 1970).

If probation is revoked, the probationer may be required to serve the sentence originally imposed, or any lesser sentence, and if imposition of sentence was suspended he may receive any sentence which might have been imposed. 18 U.S.C. §3653. When a split sentence is imposed under 18 U.S.C. §3651 and probation is subsequently revoked, the probationer is entitled to credit for the time served in jail but not for the time he was on probation. *Thomas v. United States*, 327 F.2d 795 (10th Cir.), cert, denied 377 U.S. 1000 (1964); *Schley v. Peyton*, 280 F.Supp. 307 (W.D.Va. 1968).

*Note to Subdivision* (b). Subdivision (b) concerns proceedings on modification of probation (as provided for in 18 U.S.C. §3651). The probationer should have the right to apply to the sentencing court for a clarification or change of conditions. American Bar Association, Standards Relating to Probation §3.1(c) (Approved Draft, 1970). This avenue is important for two reasons: (1) the probationer should be able to obtain resolution of a dispute over an ambiguous term or the meaning of a condition without first having to violate it; and (2) in cases of neglect, overwork, or simply unreasonableness on the part of the probation officer, the probationer should have recourse to the sentencing court when a condition needs clarification or modification.

Probation conditions should be subject to modification, for the sentencing court must be able to respond to changes in the probationer's circumstances as well as new ideas and methods of rehabilitation. See generally ABA Standards, supra, §3.3. The Sentencing court is given the authority to shorten the term or end probation early upon its own motion without a hearing. And while the modification of probation is a part of the sentencing procedure, so that the probationer is ordinarily entitled to a hearing and presence of counsel, a modification favorable to the probationer may be accomplished without a hearing in the presence of defendant and counsel. *United States v. Bailey*, 343 F.Supp. 76 (W.D.Mo. 1971).

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1989 AMENDMENT

The amendments recognize that convicted defendants may be on supervised release as well as on probation. See 18 U.S.C. §§3583, and 3624(e).

NOTES OF ADVISORY COMMITTEE ON RULES—1991 AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

The addition of subdivision (c) is one of several amendments that extend Rule 26.2 to Rules 32(f), 32.1, 46, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. §2255. As noted in the Committee Note to Rule 26.2, the primary reason for extending that Rule to other hearings and proceedings rests heavily upon the compelling need for accurate information affecting the witnesses' credibility. While that need is certainly clear in a trial on the merits, it is equally compelling, if not more so, in other pretrial and posttrial proceedings in which both the prosecution and defense have high interests at stake. In the case of revocation or modification of probation or supervised release proceedings, not only is the defendant's liberty interest at stake, the government has a stake in protecting the interests of the community.

Requiring production of witness statements at hearings conducted under Rule 32.1 will enhance the procedural due process which the rule now provides and which the Supreme Court required in *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Access to prior statements of a witness will enhance the ability of both the defense and prosecution to test the credibility of the other side's witnesses under Rule 32.1(a)(1), (a)(2), and (b) and thus will assist the court in assessing credibility.

A witness's statement must be produced only if the witness testifies.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 32.1 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 32.1 has been completely revised and expanded. The Committee believed that it was important to spell out more completely in this rule the various procedural steps that must be met when dealing with a revocation or modification of probation or supervised release. To that end, some language formerly located in Rule 40 has been moved to revised Rule 32.1. Throughout the rule, the terms ''magistrate judge,'' and ''court'' (*see* revised Rule 1(b) (Definitions)) are used to reflect that in revocation cases, initial proceedings in both felony and misdemeanor cases will normally be conducted before a magistrate judge, although a district judge may also conduct them. But a district judge must make the revocation decision if the offense of conviction was a felony. *See* 18 U.S.C. §3401(i) (recognizing that district judge may designate a magistrate judge to conduct a hearing and submit proposed findings of fact and recommendations).

Revised Rule 32.1(a)(1)–(4) is new material. Presently, there is no provision in the rules for conducting initial appearances for defendants charged with violating probation or supervised release—although some districts apply such procedures. Although the rule labels these proceedings as initial appearances, the Committee believed that it was best to separate those proceedings from Rule 5 proceedings, because the procedures differ for persons who are charged with violating conditions of probation or supervised release.

The Committee is also aware that, in some districts, it is not the practice to have an initial appearance for a revocation of probation or supervised release proceeding. Although Rule 32.1(a) will require such an appearance, nothing in the rule prohibits a court from combining the initial appearance proceeding, if convened consistent with the ''without unnecessary delay'' time requirement of the rule, with the preliminary hearing under Rule 32.1(b).

Revised Rule 32.1(a)(5) is derived from current Rule 40(d).

Revised Rule 32.1(a)(6), which is derived from current Rule 46(c), provides that the defendant bears the burden of showing that he or she will not flee or pose a danger pending a hearing on the revocation of probation or supervised release. The Committee believes that the new language is not a substantive change because it makes no change in practice.

Rule 32.1(b)(1)(B)(iii) and Rule 32.1(b)(2)(C) address the ability of a releasee to question adverse witnesses at the preliminary and revocation hearings. Those provisions recognize that the court should apply a balancing test at the hearing itself when considering the releasee's asserted right to cross-examine adverse witnesses. The court is to balance the person's interest in the constitutionally guaranteed right to confrontation against the government's good cause for denying it. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999); *United States v. Walker*, 117 F.3d 417 (9th Cir. 1997); *United States v. Zentgraf*, 20 F.3d 906 (8th Cir. 1994).

Rule 32.1(c)(2)(A) permits the person to waive a hearing to modify the conditions of probation or supervised release. Although that language is new to the rule, the Committee believes that it reflects current practice.

The remainder of revised Rule 32.1 is derived from the current Rule 32.1.

COMMITTEE NOTES ON RULES—2005 AMENDMENT

The amendments to Rule 32.1(b) and (c) are intended to address a gap in the rule. As noted by the court in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002) (per curiam), there is no explicit provision in current Rule 32.1 for allocution rights for a person upon revocation of supervised release. In that case the court noted that several circuits had concluded that the right to allocution in Rule 32 extended to supervised release revocation hearings. *See United States v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997) (Rule 32 right to allocution applies); *United States v. Rodriguez*, 23 F.3d 919, 921 (5th Cir. 1997) (right of allocution, in Rule 32, applies at revocation proceeding). But the court agreed with the Sixth Circuit that the allocution right in Rule 32 was not incorporated into Rule 32.1. *See United States v. Waters*, 158 F.3d 933 (6th Cir. 1998) (allocution right in Rule 32 does not apply to revocation proceedings). The *Frazier* court observed that the problem with the incorporation approach is that it would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1. 283 F.3d at 1245. The court, however, believed that it would be ''better practice'' for courts to provide for allocution at revocation proceedings and stated that ''[t]he right of allocution seems both important and firmly embedded in our jurisprudence.'' *Id*.

The amended rule recognizes the importance of allocution and now explicitly recognizes that right at Rule 32.1(b)(2) revocation hearings, and extends it as well to Rule 32.1(c)(1) modification hearings where the court may decide to modify the terms or conditions of the defendant's probation. In each instance the court is required to give the defendant the opportunity to make a statement and present any mitigating information.

*Changes Made After Publication and Comment*. The Committee made no changes to Rule 32.1 following publication.

COMMITTEE NOTES ON RULES—2006 AMENDMENT

*Subdivision (a)(5)(B)(i)*. Rule 32.1(a)(5)(B)(i) has been amended to permit the magistrate judge to accept a judgment, warrant, and warrant application by reliable electronic means. Currently, the rule requires the government to produce certified copies of those documents. This amendment parallels similar changes to Rules 5 and 41.

The amendment reflects a number of significant improvements in technology. First, receiving documents by facsimile has become very commonplace and many courts are now equipped to receive filings by electronic means, and indeed, some courts encourage or require that certain documents be filed by electronic means. Second, the technology has advanced to the state where such filings could be sent from, and received at, locations outside the courthouse. Third, electronic media can now provide improved quality of transmission and security measures. In short, in a particular case, using electronic media to transmit a document might be just as reliable and efficient as using a facsimile.

The term ''electronic'' is used to provide some flexibility to the rule and make allowance for further technological advances in transmitting data. The Committee envisions that the term ''electronic'' would include use of facsimile transmissions.

The rule requires that if electronic means are to be used to transmit a warrant to the magistrate judge, the means used be ''reliable.'' While the rule does not further define that term, the Committee envisions that a court or magistrate judge would make that determination as a local matter. In deciding whether a particular electronic means, or media, would be reliable, the court might consider first, the expected quality and clarity of the transmission. For example, is it possible to read the contents of the warrant in its entirety, as though it were the original or a clean photocopy? Second, the court may wish to consider whether security measures are available to insure that the transmission is not compromised. In this regard, most courts are now equipped to require that certain documents contain a digital signature, or some other similar system for restricting access. Third, the court may consider whether there are reliable means of preserving the document for later use.

*Changes Made After Publication and Comment*. The Committee made minor clarifying changes in the published rule at the suggestion of the Style Committee.

COMMITTEE NOTES ON RULES—2010 AMENDMENT

*Subdivision (a)(6)*. This amendment is designed to end confusion regarding the applicability of 18 U.S.C. §3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of §3143(a) arose because several subsections of the statute are ill suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence.

*Changes Made to Proposed Amendment Released for Public Comment*. No changes were made after the amendment was released for public comment.

AMENDMENT BY PUBLIC LAW

1986—Subd. (b). Pub. L. 99–646 inserted ''to be'' after ''relief'' and inserted provision relating to objection from the attorney for the government after notice of the proposed relief and extension of the term of probation as not favorable to the probationer for the purposes of this rule.

EFFECTIVE DATE OF 1986 AMENDMENT

Section 12(c)(2) of Pub. L. 99–646 provided that: ''The amendments made by subsection (b) [amending this rule] shall take effect 30 days after the date of enactment of this Act [Nov. 10, 1986].''

EFFECTIVE DATE OF RULE

This rule added by order of the United States Supreme Court of Apr. 30, 1979, effective Dec. 1, 1980, see section 1(1) of Pub. L. 96–42, July 31, 1979, 93 Stat. 326, set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure.

## Rule 32.2. Criminal Forfeiture

(a) NOTICE TO THE DEFENDANT. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) ENTERING A PRELIMINARY ORDER OF FORFEITURE.

(1) *Forfeiture Phase of the Trial.*

(A) *Forfeiture Determinations.* As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment